NON-CUMULATIVE ZONING ORDINANCE UPHELD

People ex rel. Skokie Town House Builders, Inc. v. Village of Morton Grove, 16 Ill. 2d 183, 157 N.E.2d 33 (1959)

The Village of Morton Grove, Illinois, amended its zoning ordinance to prohibit residential use in districts zoned for commercial use. The Circuit Court, Cook County, granted a writ of *mandamus* requiring the Village to issue building permits for four townhouses to be built in a district zoned for commercial use only. On an appeal of this decision by the Village, plaintiff (appellee) attacked the zoning ordinance on two grounds: (1) that it violated the due process clauses of both the state and federal constitutions,[1] being an unreasonable interference with plaintiff's use of his private property; and (2) that it was, in any event, inapplicable here in that plaintiff held a vested property interest prior to the enactment of the exclusive zoning provision.[2] The Illinois Supreme Court held that plaintiff had a vested interest in the property at the time of the amendment of the ordinance and thus affirmed the issuance of the writ.[3] While not the basis of this decision, the court declared that the ordinance was not an unconstitutional use of the police power. It is this *dictum* which raises the question noted herein.

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[1] U.S. CONST. amend. XIV, § 1, ILL. CONST. art 2, § 2.

[2] Plaintiff had expended certain sums for plans, plot plans, commitment for a mortgage loan, $1,630 for permits and contractor's permits once issued but later revoked by the village, and $200 deposit for sidewalks, all in reliance on the original zoning ordinance which classified plaintiff's property to include certain dwellings. The ordinance was thereafter amended to exclude residential usage.

[3] The basic rule is that mere contemplated use, unrealized at the effective date of the zoning regulation, is not sufficient to become a non-conforming use. 101 C.J.S. *Zoning* § 186 (1958). However, where there has been a substantial change in position (either through actual construction or incurring of non-construction liabilities) the conduct qualifies as a permissive non-conforming use. 101 C.J.S. *Zoning* § 187 (1958). As to how far a project must go before leaving the area of mere contemplation into becoming a substantial change of position there is mixed judicial opinion. However, there does seem to be general agreement that insignificant expenditures either in construction or planning will not suffice, while active, continued construction seems to be clearly acceptable. See Annot., 138 A.L.R. 500 (1942). The general rule seems to be that whatever expenditure is involved must occur after the construction permit has been received, with most cases arising out of a subsequent revocation of the permit in conformance with amended zoning ordinances.

Here, the Illinois court appears to be unusually lenient in that it not only considers the investment in building plans and loan commitments in an unspecified amount, together with $1830 in permit costs as a substantial change of position; but, it also takes into consideration expenditures made *before* issuance of permit in reliance on the probability of its issuance. 157 N.E.2d at 37. See Fifteen Fifty North State Building Corp. v. City of Chicago, 15 Ill. 2d 408, 155 N.E.2d 97 (1958); Deer Park Civic Ass'n. v. City of Chicago, 347 Ill. App. 346, 106 N.E.2d 823 (1952). While the court seems to regard the failure of the building commission to tender back the permit fees paid as some evidence of a substantial change in position, it is apparent that this is but "makeweight" in the absence of any speci-

The court's justification for upholding the ordinance reflects a recent trend in the law of zoning. Traditionally, zoning plans have been cumulative in effect, progressing from the "highest use" to the "lowest use", each classification including all higher uses.[4] For example, a city might zone one area for exclusively residential use, a second area might include both residences and light commercial use (such as drug stores and grocery markets), while a third would include residential, light commercial and heavy industrial use. The underlying philosophy seemed to be that the public health, welfare, safety and morals could best be protected in the priority afforded private dwelling usage and necessary supporting market facilities. Increased industrial growth and the corresponding urbanization movement have created social and economic problems not previously confronted.[5] Areas once residential gave way to industrial expansion. The consequent rise of slums created municipal problems in public health and safety of children.

Recognizing a need for correcting this situation without further restricting industrial development, many cities adopted the non-cumulative approach to zoning, permitting exclusion of residential structures (a "higher" use) from commercial and industrial areas ("lower" use).[6] This method is designed to provide for industrial expansion space, minimum traffic congestion for the free flow of products and supplies, while at the same time affording better protection for public health and welfare by permitting a greater degree of cleanliness, safety for children and an opportunity to preserve the beauty of the community.

Such ordinances have only recently been at issue in the courts, the first case being *Corthouts v. Town of Newington*,[7] decided in 1953. In that case an ordinance similar to the one in the principal case was held invalid as it applied to the plaintiff's land, because there was no evidence of any current plans for industrial use of the land nor any for a reasonable time in the future, while plaintiff's land was presently desirable and in demand for residential purposes.[8] The court there, however, did not close the door on non-cumulative zoning, pointing out that it was con-

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fied amount of investment on plot plans, etc. (that there *were* such unspecified costs incurred was stipulated by the parties). 157 N.E.2d at 37. Thus it would seem that even if the permit costs were refunded or tendered back the court felt that there was still substantial expenditure here and that such conduct under similar circumstances would not be sufficient to defeat a claim of vested interest in Illinois.

[4] See BAKER, LEGAL ASPECTS OF ZONING 66 (1927); BASSETT, ZONING 63 (1940); Annot., 38 A.L.R.2d 1141 (1954). The term "highest use" ordinarily refers to private residential usage, while "lowest use" normally would be heavy industry.

[5] See Village of Euclid v. Ambler Realty Company, 272 U.S. 365 (1926).

[6] See RATHKOPF, ZONING AND PLANNING 58 (2d ed. 1951); WILLIAMS, CITY PLANNING AND ZONING 277 (1922).

[7] 140 Conn. 284, 99 A.2d 112 (1953), noted in 52 MICH. L. REV. 925-26 (1954).

[8] The municipality's case was further weakened by the fact that school buildings, motels, club rooms, stores, etc., were permitted inconsistent with the exclusion of residences.

ceivable that such an ordinance, under different circumstances could be a reasonable protection of public health and welfare.[9] Since *Corthouts* there have been eight reported cases deciding the issue (excluding the principal case),[10] four of which held the ordinance in question invalid,[11] but all holding that non-cumulative zoning is not unconstitutional *per se*.

Here, the Illinois court met the question squarely and unanimously ruled the ordinance reasonable. The court pointed out that zoning is properly within the police power of a state[12] and that such power can be delegated to a municipality.[13] The only limitation on the municipality's exercise of that power and the exclusion thereunder of residence from industrial districts is that the exclusion "bear a substantial relationship to the preservation of the public health, safety, morals or general welfare."[14]

Ordinarily zoning ordinances are constitutionally attacked as being unreasonable exercises of police powers, with such epithets as "spot zoning" thrown in where an ordinance seems undesirable to a land owner.[15] The test of the exercise of that power as to reasonableness is by determining whether a zoning scheme is part of a "comprehensive plan" dedicated to the further development of the community.[16] The United States Supreme

[9] "It is easy to conceive a statute where the erection and occupation of dwelling houses on land in an industrial area in close proximity to manufactories using highly inflammable or explosive materials or giving off noxious odors or pernicious gases would have a direct relation to the public health, safety and welfare and justify prohibiting legislation against the use of such land for residence purposes." Corthouts v. Town of Newington, 140 Conn. at 288, 99 A.2d at 114.

[10] Roney v. Board of Supervisors of Contra Costa County, 138 Cal. App.2d 740, 292 P.2d 529 (1956) (upheld); Comer v. City of Dearborn, 342 Mich. 471, 70 N.W.2d 813 (1955); Kozesnik v. Township of Montgomery, 24 N.J. 154, 131 A.2d 1 (1957) (decided together with Depew v. Township of Hillsborough); Katobimar Realty Co. v. Webster, 20 N.J. 114, 118 A.2d 824 (1955); Newark Milk & Cream Co. v. Township of Parsippany-Troy Hills, 47 N.J. Super. 306, 135 A.2d 682 (1957) (upheld); Hinna v. Board of Appeals, 11 Misc.2d 349, 170 N.Y.S.2d 12 (1957) (upheld); Logan v. Bickel, 11 Pa. Dist. & Co.2d 405, 43 Del. Co. 272 (1956) (upheld).

[11] In Katobimar Realty, Comer, Kozesnik, and Depew, *supra* note 10, the ordinances were invalidated for other reasons, but the non-cumulative nature of them was upheld as to plaintiff's property.

[12] 157 N.E.2d at 36.

[13] The court found such a delegation in broad powers given over to municipalities by the Revised Cities and Villages Act, Ill. Rev. Stat. 1957, c. 24, pars. 72-1 to 73-12. Paragraph 73-1 (4) of that act provides municipal power "to classify, regulate and restrict . . . the location of buildings designed for specified industrial, business, residential and other uses." Paragraph 73-1 (7) empowers a municipality "to prohibit uses, buildings or structures incompatible with the character of such districts." In the former the court saw municipal powers to zone regarding industrial or residential usages, while it found the power to exclude either one from the other in the latter provision. 157 N.E.2d at 36.

[14] *Ibid.*

[15] Village of Euclid v. Ambler Realty Company, *supra* note 5.

[16] *Ibid.*

Court has given the Congress wide discretion in this area,[17] while the state courts have been more inclined to question the zoning plans enacted by state legislatures and their administrative delegates.

From the reported decisions it is apparent that there is an important difference in attitude with which the courts view the narrower question of non-cumulative zoning. The *Corthouts* case[18] represents the viewpoint that, while the concept of restricting residences from industrial areas seems feasible where there is direct danger *to the residential owners* through hazardous industrial operations, that is the *only* situation in which it is acceptable. In *Comer v. Dearborn*,[19] the court reflected a similar view in holding that where the area was not now "industrial" and there were already many houses and shops, a non-cumulative ordinance was arbitrary and unreasonable in view of the fact that there was no evidence of the area becoming industrially populated in the near future. The *Katobimar Realty* case[20] held that a shopping center was not incompatible with light manufacturing and that an ordinance restricting such use from the industrial zone was capricious, unreasonable and arbitrary, bearing no substantial relationship to public welfare. These cases show an emphasis on residential usage as opposed to industrial usage. There seems to be little concern under this view for city planning (as evidenced by such statements as "unreasonable in *this* situation," "not yet industrial," "no substantial relation to public welfare") rather, the tendency here is toward the traditional favoritism for residential use of property.[21]

The Illinois court indicates a more realistic attitude from which to view the concept of non-cumulative zoning. This court has recognized the changes in our society and the complex problems facing cities today, and has seen a twofold value of the non-cumulative zoning device as a means of alleviating some of those problems. This type zoning helps relieve the city of the danger of industrial operations in an area including many residences by reducing commercial traffic where children are at

[17] "It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them." Berman v. Parker, 348 U.S. 26, 33 (1954).

[18] *Supra* note 7.

[19] *Supra* note 10.

[20] *Supra* note 10.

[21] "In one or two ordinances, residences are altogether excluded from the heavy manufacturing districts, as is sometimes done in Germany. If the district is kept small, this may be altogether advantageous; although it would seem to involve the creation of a neighboring district, devoted to housing, which could be made industrial later, if expansion of the original industrial district became necessary. If, however, the industrial district is large enough for all expansion, it would be a hardship and an economic waste to keep owners of land from using it (until needed for manufacturing) for the only purposes for which it would be utilized." WILLIAMS, CITY PLANNING AND ZONING 277 (1922). See also 32 N.Y.U. L. REV.

play, avoiding dirty, unattractive neighborhoods resulting from industrial smoke and gases, and averting other unpleasant and delinquency-breeding hazards caused by lack of adequate facilities for playgrounds, schools and parks. With regard to this type problem, the court points out that ". . . it is not unreasonable for a legislative body to assume that separation of the areas (industry and residential) would tend in the long run to insure a better and a more economical use of municipal services . . . and better use of street facilities."[22] Non-cumulative zoning is also valuable to the burdened city from another viewpoint. A city needs industry and must provide an attractive climate in order to allow existing industries to prosper and to inject new business and new blood into the community. Just as a homeowner is interested in maintaining a healthy atmosphere for his family and an attractive homesite, so is an industry interested in protecting its plant site, and insuring an efficient and productive operation. Admittedly, heavy industrial traffic is a hazard to residential usage; however, it is also true that heavy residential traffic or serious restrictions on industrial traffic hamper the efficient flow of industrial supplies and finished products. Moreover, industry is aware of the undesirable tendency for the growth of slum areas on its periphery to the detriment of both plant site attractiveness and employee welfare.[23] It is generally recognized that encirclement of an industrial area by taverns, gambling spots and similar employee traps has a harmful effect on a company's work force and therefore is no more desirable from industry's standpoint than it would be for an expensive residential neighborhood. Judge House, speaking for the unanimous Illinois court, clearly recognizes this proposition:

> The general welfare of the public may be enhanced if industry and commerce are provided with a favorable climate. The sale of a few lots at important points in a district may make industrial or commercial expansion impossible or prohibitively expensive. To protect the residents in the district, traffic may be slowed down unduly and thus detract from the efficiency of production and trade. In final analysis, it seems clear that industry and commerce are also necessary and desirable and that a proper environment for them will promote the general welfare of the public.[24]

In *Roney v. Board of Supervisors*,[25] the court refused to permit construction of a housing project in an area zoned by the city for heavy industrial purposes, pointing out that the land was not shown to be un-

[22] 157 N.E.2d at 36.

[23] Industry is not only interested in space from a production standpoint, but in this age of modern construction, it wants an attractive industrial location too. For many years the city of Cleveland has sponsored a competition for the most attractive industrial grounds in the area. Annually industries strive for this honor and proudly display plaques given in recognition of their achievements.

[24] 157 N.E.2d at 36.

[25] *Supra* note 10.

usable for industrial purposes within a reasonable time. The *Kozesnik* case,[26] though the ordinance was invalid for other reasons, refused to accept arguments made as to the unreasonableness of the non-cumulative concept. *Newark Milk*[27] and the *Logan* case[28] clearly support the position taken by the Illinois court. These cases all emphasize the necessity for consideration of the needs of industry in a sound zoning plan. Courts maintaining this attitude seem to recognize that a complex, industrial community no longer should concentrate on "higher" or "lower" uses; but, rather must face the problem as it now stands—that these are but "different" uses to be treated with due respect for the needs of each.[29]

It is essential that our economy be permitted to grow and our social communities to flourish along with it. Non-cumulative zoning is a device particularly helpful in this area to city planners, charged with the task of planning future expansion for a community.[30] It is, in fact, the very essence of flexible comprehensive planning. That its indiscriminate use is dangerous, is readily admitted. The Illinois court recognized this hazard in a *caveat* proposing caution in this area "because of the existing admixture of residential, commercial and industrial uses."[31] Bearing in mind this note of caution, it can be reasonably concluded, however, that in view of the changing society in which we live, the modern concept of non-cumulative zoning will gain strength and eventually become a universally accepted principle of city planning.

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[26] "Experience has satisfied many that, for example, homes are no more appropriate in an industrial district, than industry in a residential one." 24 N.J. 154 at 169, 131 A.2d 1 at 9.

[27] *Supra* note 10.

[28] "If in those areas where industry is permitted to locate, other types of construction are permitted to encroach, industrial expansion would be stifled." 11 Pa. Dist. & Co. 2d. 405 at 410.

[29] In the Roney case, *supra* note 10, the court said, ". . . it cannot be held that there is anything arbitrary or unreasonable *per se* in the plan of zoning to prevent the so-called 'higher' uses from invading a 'lower' use area . . . . In fact, the term 'higher' as applied to residential uses . . . is not an accurate one; for, although the use of property for homes is 'higher' in the sense that commercial and industrial uses exist for the purpose of serving family life, the better these secondary uses can accomplish their purposes, the better is the primary use of the property served." 138 Cal. App. at 746, 292 P.2d at 532.

[30] The recent location of a multi-million dollar Western Electric Company plant in Columbus, Ohio, has been in large part attributed to the fact that the city had zoned a large area (in which the plant was ultimately located) exclusively for industrial use. Were it not for this factor Columbus might well have lost the plant. Discussion of planning effects can be found in an appendix to the N.Y.U. L. REV. survey cited *supra* note 6.

[31] 157 N.E.2d at 36.